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# REFORMING LABOUR LAWS IN THE NETHERLANDS: AN ASSESSMENT OF THE REDISTRIBUTIVE EFFECTS

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## 1. INTRODUCTION

The rise of economic inequality is seen by many as one of the biggest current threats to our societies. Even organisations such as the Organisation for Economic Co-operation and Development (OECD) and International Monetary Fund (IMF) warn for unsustainable economic inequality in the future.<sup>2</sup> The debate on inequality is, however, often ‘emotional and divisive’.<sup>3</sup> A widely proclaimed view is that only the tax (and social security) systems should concern themselves with distribution and redistribution of wealth.<sup>4</sup> The reason is that this kind of ‘intervention’ is considered to be most efficient, because in this way the market is disturbed in the least possible way. Our tax and social security systems are indisputably important when we consider the legal systems in the light of economic inequality. However, when looking at the potential of legal frameworks to influence the level of economic inequality – and more specifically, income inequality – one cannot deny the role of labour law. Davidov, for examples, calls redistribution a ‘major goal of labour law’.<sup>5</sup> The very fact that we have protective labour laws assumes a certain intervention in the functioning of the (labour) market and a certain distributive effect.

It is important to scrutinise labour law’s redistributive role especially where it concerns the regulation of flexible work. The increase of non-standard employment has been indicated as one of the important contributors to rising inequality.<sup>6</sup> This contribution, therefore, examines recent labour law reforms in the Netherlands in terms of their distributive aims and effects. Are redistributive concerns part of the reform motives, and if so, what kind of redistribution do the legislators have in mind? Furthermore, what kind of legal mechanisms do they use to reach the redistributive goals and are these mechanisms likely to reach their goals considering what we know about economic inequality?

To answer these questions, first, non-standard work in the Netherlands is discussed, followed by a discussion of the level of economic inequality in a comparative perspective. The next step is to zoom in on the relation between non-standard work and economic inequality. For this end, this article mainly uses insights from economic literature. The main aim of this article is to examine – in paragraph 3 – the recent legislative attempts in the Netherlands that deal with the growth of non-standard work and to consider them in the light of the rising economic inequality. Conclusions follow in paragraph 4.

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<sup>2</sup> OECD, *In it together: Why less inequality benefits all*, OECD Publishing, Paris, 2015; OECD, *Divided We Stand: Why Inequality Keeps Rising*, OECD Publishing, Paris 2011; World Bank Group, *Poverty and Shared Prosperity 2016. Taking on Inequality*, Washington 2016; IMF, *World Economic Outlook*, April 2017.

<sup>3</sup> S. Hsu, ‘The Rise and Rise of the One Percent: Considering Legal Causes of Inequality’, *Emory Law Journal Online* 2015, Vol. 64, p. 2045.

<sup>4</sup> M. Dimick, ‘Should the law do anything about economic inequality?’, *Cornell Journal of Law and Public Policy* 2016 Vol. 26 No. 1, p. 2-3.

<sup>5</sup> G. Davidov, *A Purposive Approach to Labour Law*, Oxford: Oxford University Press 2016, p. 57.

<sup>6</sup> E.g. OECD 2015, p. 28-32.

## 2. NON-STANDARD WORK IN THE NETHERLANDS

### 2.1 Non-standard work in the Netherlands

The increase of the use of flexible types of employment contracts has been considerable in the Netherlands in the past decade.<sup>7</sup> Flexible employment as well as the number of independent contractors are rising. In 2015, 21% of the workers had a flexible contract, while in 2003, this was 13,6%.<sup>8</sup> It seems that especially the most flexible and unsecure types of employment contracts, such as zero-hours contracts, are on the rise.<sup>9</sup> Moreover, the transitions from flexible work to more permanent positions seem to be decreasing.<sup>10</sup> Some are speaking of a true segregation in the Dutch labour market: with a decreasing group of well protected insiders enjoying permanent employment contracts on the one side, and a growing group of employees on the other side working in flexible employment relations that offer little protection against the loss of the job.<sup>11</sup>

### 2.2 The extent of economic inequality in the Netherlands

The general perception is that the Netherlands is a fairly equal country. There is a developed welfare state that provides a good ‘safety net’ for those in need. There is a comprehensive system of progressive taxes and a social security system that can probably be placed among the best in the world.<sup>12</sup> But also in the Netherlands, economic inequality has been rising.<sup>13</sup> Particularly wealth inequality is relatively high in the Netherlands<sup>14</sup> and it has been rising in the recent

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<sup>7</sup> L. Köster & W. Smits, ‘Tijdelijk werk: Nederland in Europees perspectief’, in: *Dynamiek op de Nederlandse Arbeidsmarkt 2014*, CBS 2015, p. 147-148; A. Heyma & S. van der Werff, ‘De sociaaleconomische situatie van langdurig flexibele werknemers’, Amsterdam: SEO 2013.

<sup>8</sup> CPB, *De flexibele schil van de Nederlandse arbeidsmarkt*, CPB Achtergronddocument November 17, 2016. Other documents report an increase from 16% in 2003 to 27% in 2017, Statistics Netherlands (CBS), *Werkzame beroepsbevolking; positie in de werkring*, <https://opendata.cbs.nl/statline> (website visited on 19 March 2018).

<sup>9</sup> CPB 2016.

<sup>10</sup> Köster & Smits 2014, p. 147-148. Also see R. Dekker, ‘Doorstroom van Flexwerkers’, *ESB Arbeidsrecht* 2012 (4628), p. 70-73.

<sup>11</sup> N. Gundt, ‘Employment and security in the Netherlands’, *European Labour Law Journal* 2015 Vol. 6 No. 4, p. 365.

<sup>12</sup> See e.g. F. Pennings, *The International Encyclopaedia of Laws. The Netherlands*, Wolters Kluwer: Kluwer Law Online 2017.

<sup>13</sup> Just like in general, there is discussion among economists in the Netherlands on how to measure economic inequality; there is no consensus on this matter yet. Furthermore, there is a lot of data missing, see e.g. G. Zucman, ‘Wealth inequality’, in *State of the Union. The Poverty and Inequality Report*, Stanford Center on Poverty and Inequality 2016, p. 43.

<sup>14</sup> C. Balestra & R. Tonkin, ‘Inequalities in household wealth across OECD countries: Evidence from the OECD Wealth Distribution Database’, OECD Statistics and Data Directorate, Working Paper nr. 88, juni 2018, p. 8; B. van Bavel, ‘Vermogensongelijkheid in Nederland: de vergeten dimensie’, in M. Kremer, M. Bovens, E. Schrijvers & R. Went (eds.), *Hoe ongelijk is Nederland?*, WRR-verkenning 2014, p. 84.

years.<sup>15</sup> Income inequality is always much smaller than wealth inequality and it does not seem to be high in the Netherlands; it is average compared to other OECD-countries.<sup>16</sup> But the global trends in this context are visible here as well: since the end of the nineties, the gap between the highest and the lowest income groups has grown considerably.<sup>17</sup> The wages at the bottom are stagnating, while the wages at the top have grown substantially. Not only the top and the bottom have grown apart but also the disparity with the middle incomes has grown.<sup>18</sup> Furthermore, the labour income share – the part of national income allocated to wages – has been on the decline in the Netherlands,<sup>19</sup> just as it has been in the rest of the world.<sup>20</sup>

### 2.3 Relationship between non-standard work and inequality

Globalisation and technological change are seen by most economists as the main drivers of inequality.<sup>21</sup> As a result of technological development, the demand for skilled labour increases which causes the wage gap between the low-educated and the high-educated workers to increase.<sup>22</sup> The decline in labour shares driven by technology and global integration has been particularly sharp for middle-skilled labour. The fact that routine-based technology has taken over many of the tasks performed by middle-skilled labour contributes to job polarisation towards high-skill and low-skill occupations.<sup>23</sup>

However, many believe that globalisation and technological change alone cannot explain the rise of economic inequality; they believe institutional changes have significantly contributed to the rise of inequality as well.<sup>24</sup> The declining strength of trade unions is one of the most important institutional changes in this regard, but the flexibilisation of the labour market seems to be important as well. The OECD observes that before the crisis, many OECD countries were facing a paradoxical situation: their employment rates were at record-high levels and yet income

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<sup>15</sup> R. Schulenberg, 'Toenemende vermogensongelijkheid in Nederland', *ESB* 2018, 4762-286.

<sup>16</sup> M. Kremer, R. Went & M. Bovens, 'Economische ongelijkheid in Nederland', in M. Kremer, M. Bovens, E. Schrijvers & R. Went (red.), *Hoe ongelijk is Nederland?*, WRR-verkenning 2014, p. 15.

<sup>17</sup> Ibid, p. 16.

<sup>18</sup> CBS, 'Verschil in loon tussen top en gewone werknemer nam toe', mei 2018, <https://www.cbs.nl/nl-nieuws/2018/18/verschil-in-loon-tussen-top-en-gewone-werknemer-nam-toe> (website visited on 3 July 2018).

<sup>19</sup> DNBulletin: 'Flexibilisering arbeidsmarkt gaat gepaard met daling arbeidsinkomensquote', 1 February 2018, <https://www.dnb.nl/nieuws/nieuwsoverzicht-en-archief/DNBulletin2018/dnb372062.jsp> (website lastly visited on June 11, 2018).

<sup>20</sup> European Commission, *Reflection Paper on Harnessing Globalisation*, 10 May 2017, COM(2017) 240, p. 9.

<sup>21</sup> P. de Beer, 'Groeiende beloningsverschillen in Nederland', in Kremer et al. 2014, p. 63.

<sup>22</sup> D.H. Autor, 'Skills, education, and the rise of earnings inequality among the "other 99%"', *Science* 2014 Vol. 344, No. 6186, p. 843-851; A.B. Atkinson, *Inequality. What can be done?*, Harvard University Press 2015; L. Tyson & M. Spence, 'Exploring the Effects of Technology on Income and Wealth Inequality', in H. Boushey, J.B. DeLong & M. Steinbaum, *After Piketty. The Agenda for Economics and Inequality*, Harvard University Press 2017, p. 170-208.

<sup>23</sup> IMF 2017, p. 125.

<sup>24</sup> E.g. Atkinson 2015, p. 82-83; De Beer 2014, p. 64.

inequality was on the rise.<sup>25</sup> Arguably, this is due to the gradual decline of the ‘traditional, permanent, nine-to-five job’ in favour of non-standard work – typically part-time and temporary work and self-employment. The IMF, for example, explicitly urges the Dutch government to stop the further flexibilisation of the labour market in order to encourage wage growth.<sup>26</sup>

The Dutch researchers are, however, divided on the issue. On the one side, there is the view that the decline of the labour income share is indeed connected to the flexibilisation of the labour market.<sup>27</sup> Compared to ‘standard workers’, workers with flexible, non-standard contracts – such as temporary agency workers or workers with zero-hours contracts – have less job security and are hardly organised, all of which makes their negotiating position weak. At the same time, their presence on the labour market undermines the negotiating position of the ‘standard’ workers, because the two groups compete with each other. On the other side, however, there are the economists who say they cannot determine whether flexibilisation of the labour market really has this (negative) structural effect on wage growth.<sup>28</sup> They also see positive sides of a large number of people with flexible contracts: traditionally, unemployment has a (strong) negative effect on wages, but a higher number of temporary workers reduces this negative effect of unemployment on real wages.<sup>29</sup> When unemployment is low, however, a high number of temporary workers can stagnate the wage growth. The researchers assume that in ‘good times’, temporary workers use their negotiating power to get a permanent job, instead of a higher wage. Therefore, they are not willing to accept a direct relationship between flexibilisation of the labour market and lower wage growth. Instead, they point to lower productivity growth as the main reason for stagnating wages. However, the same researchers cannot determine a link with globalisation, technological change, or shifting market power – even though there is a vast amount of literature that points in this direction – , because they have trouble ‘operationalizing’ these concepts.<sup>30</sup> This leaves us with disputable drives of inequality, but with a conclusion that the question of inequality cannot be approached with arithmetic means alone. There is a strong indication, however, that the flexibilisation of the labour market and the increase of non-standard employment are among the drivers of economic inequality. It is, therefore, worth examining if and how the regulation of non-standard employment takes this into account.

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<sup>25</sup> OECD 2015, p. 28.

<sup>26</sup> IMF Country Report No. 18/130, May 2018, p. 10.

<sup>27</sup> DNBulletin: ‘Flexibilisering arbeidsmarkt gaat gepaard met daling arbeidsinkomensquote’, 1 February 2018, <https://www.dnb.nl/nieuws/nieuwsoverzicht-en-archief/DNBulletin2018/dnb372062.jsp> (website lastly visited on June 11, 2018).

<sup>28</sup> CPB, *Vertraagde loonontwikkeling in Nederland ontrafeld*, CPB Policy Brief, 2018/12.

<sup>29</sup> CPB, *Loongroei, een analyse op bedrijvendata*, CPB Achtergronddocument, 23 November 2018, p. 23.

<sup>30</sup> Ibid, p. 18.

### 3 REGULATION OF FLEXIBLE EMPLOYMENT IN THE LIGHT OF ECONOMIC INEQUALITY

Most labour law systems in Europe have in common that they protect the employee as the weaker party. Some of these protective rules have clear redistributive effects, such as the rules on minimum wage and collective bargaining.<sup>31</sup> Collective agreements can be very effective redistributive mechanisms when they have a wide coverage. Many economists confirm the role of trade unions (and collective agreements) in lowering inequality and some of them urge the governments to strengthen that role.<sup>32</sup> However, there is an important restriction to (collective) labour law in this respect and that is the fact that most protective norms are in principle confined to employment relationships. That means that persons who do not perform labour under an employment contract, such as independent contractors, generally do not benefit from labour law protection or from redistributive measures through labour law. This is a long acknowledged constraint of labour law.<sup>33</sup> The focus of this contribution is, however, on what is happening *within* the realm of employment: the rise of atypical or non-standard employment.<sup>34</sup>

The attempts on EU-level to regulate atypical employment can be characterised as attempts with a double purpose. On the one hand, the aim has been to improve the working conditions of atypical workers, while on the other hand, the aim has been to eliminate or scale down the existing barriers for flexible contracts. These goals are pursued simultaneously. This is also the case in the Netherlands. In 2015 major changes were introduced in Dutch labour law through the Act on Work and Security (*Wet Werk en Zekerheid*), which was based on a compromise between the social partners. The aim of the reform was to improve the position of employees with flexible contracts and at the same time to make dismissal of employees with permanent contracts less costly. In the end, the result of the changes should be that the flexible or temporary contracts have become less flexible and the open-ended contracts less permanent. Even though the reforms are quite recent, there are strong doubts about whether they have brought about the desired level of balance between the ‘insiders’ and the ‘outsiders’. For example, dismissals might have become less costly, but it seems that the dismissal procedure was made more rigid with bigger risks for employers.<sup>35</sup>

In 2018, the new government proposed new changes with the Act on Labour Market in Balance (*Wet Arbeidsmarkt in Balans*). The main feature of this latest proposal for reform is the introduction of a so-called cumulating ground for dismissal in order to make it easier to dismiss

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<sup>31</sup> Cf. Davidov 2016, 57.

<sup>32</sup> Atkinson 2015, p. 128-132.

<sup>33</sup> E.g. G. Mundlak, ‘The Third Function of Labour Law: Distributing Labour Market Opportunities among Workers’, in G. Davidov & B. Langille (red.), *The idea of labour law*, Oxford: Oxford University Press 2011, p. 315-328.

<sup>34</sup> The terms atypical and non-standard are used interchangeably.

<sup>35</sup> A.R. Houweling, M.J.M.T. Keulaerds & P. Kruit, *VAAN-VvA Evaluatie-onderzoek Wwz 2016*, Den Haag, 2016, p. 12.

employees. On many issues, the new reform is only a correction of the Act on Work and Security, which makes the Act on Work and Security still the most fundamental change of the Dutch labour law since the Second World War.<sup>36</sup> It is therefore interesting to see what changes were introduced in order to improve the position of flexible employees and to assess these changes in light of the discussion on economic inequality.

### 3.1 Fostering transitions into open-ended contracts

One of the main goals of the Act on Work and Security was to prevent – what the legislator has called – ‘the improper use’ of flexible contracts.<sup>37</sup> This corresponds with the approach taken in the Pillar of Social Rights where the term ‘abuse’ of atypical contracts is used.<sup>38</sup> It is not clear when flexible contracts are used by employers in an improper way or when exactly we can say an employer is abusing flexible contracts. For the Act on Work and Security that is the case when workers are employed on flexible contracts on a long-term and involuntary basis, with little prospects of improving their position on the labour market.<sup>39</sup> In some aspects, this corresponds with the concept of precarious work. Indeed the ILO has stressed as well that nonstandard jobs are not necessarily precarious.<sup>40</sup> In other words, non-standard or flexible jobs are not necessarily bad jobs. Therefore, even though the European and the Dutch legislator wish to tackle abuse of flexible employment, they both in the same (legislative) documents affirm the ‘regular’ use of flexible contracts and stress that they aim to ensure ‘the necessary flexibility for employers, to adapt swiftly to changes in the economic context’.<sup>41</sup> Therefore, the range of flexible types contracts is not limited; the goal instead is to foster the transition towards open-ended forms of contracts. The Dutch government took a number of measures to achieve this goal. One of the main measures was limiting the use of *successive* fixed-term contracts from a maximum of three years to two years.<sup>42</sup> According to the government, the employer should be able to know after two years whether he has the possibility to hire that employee on a permanent basis.<sup>43</sup>

What non-standard work arrangements usually have in common besides in most cases *de facto* lower wages – which is obviously of great relevance to economic inequality and will be discussed below – is the fact that they give no or very little claim to job continuity in the future. The fixed-term contract is the best example of an atypical employment contract that gives no

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<sup>36</sup> Gundt 2015, p. 364.

<sup>37</sup> *Oneigenlijk gebruik*, see parliamentary documents No. 33 818/3 (*Kamerstukken II* 2013-2014, 33 818, nr. 3), p. 4.

<sup>38</sup> Article 5 sub d of the European Pillar of Social Rights, p. 14.

<sup>39</sup> *Kamerstukken II* 2013-2014, 33 818, nr. 3 (MvT), p. 10.

<sup>40</sup> ILO, *Non-standard employment around the world: Understanding challenges, shaping prospects*, International Labour Office – Geneva: ILO 2016, p. 18.

<sup>41</sup> Article 5 under b of the European Pillar of Social Rights.

<sup>42</sup> Article 7:668a Civil Code.

<sup>43</sup> *Kamerstukken II* 2013-2014, 33 818, nr. 3, p. 15; 95. Furthermore, the interval between employment, after which a new ‘chain’ of employment contracts should start, has been prolonged from three to six months.



claim to job continuity after a fixed date or after a certain period of time.<sup>44</sup> Temporary agency work is another example of flexible employment that is legally designed in such way that it gives very little claim to job continuity (with the user undertaking). It is therefore not surprising that when seeking to improve the position of atypical workers, legislators have tried to advance their chances of obtaining an open-ended contract. The Fixed-term Directive for this purpose gives the Member States a choice in measures to limit the use of *successive* fixed-term contracts. A Member State may require objective reasons for justifying the renewal of such contracts, impose a maximum total duration of successive fixed-term contracts, or impose a maximum number of renewals of such contracts.<sup>45</sup> After the maximum duration or after the maximum number of fixed-term contracts, the employer can choose either to employ the worker in question on the basis of an open-ended contract or the employer can choose not to continue the employment relationship with the worker in question. When applying the Fixed-term Directive, the Court of Justice of the EU (CJEU) has asserted that ‘the benefit of stable employment (...) constitutes a major element in the protection of workers’.<sup>46</sup> This has been one of the central considerations in several CJEU rulings on flexible employment. The rulings of the CJEU have been interpreted as favouring permanent (i.e., open-ended) employment contracts as a rule over flexible ones.<sup>47</sup>

To sum up, one could say that the policy has been so far to allow for the use of flexible or non-standard work, because flexible jobs do not have to be precarious or bad, but for workers, they should be stepping stones to more stable employment. Therefore, the policy is geared towards fostering transitions to open-ended employment namely by limiting the use of *successive* fixed-term contracts. As said, the Act on Work and Security reduced the use of successive fixed-term contracts in the Netherlands from a maximum of three years to two years.<sup>48</sup>

The law still does not require from the employer to show an objective reason to justify the recourse to fixed-term work. This approach of only limiting the use of successive fixed-term contracts may work in some sectors, but it has little effect in sectors where workers can easily be replaced by other workers and where the costs of recruiting and training new workers are low. This is often the case in the restaurant business, cleaning, supermarkets and other retail business, agriculture, delivering services, etc. In these sectors, the employer can employ a worker on a fixed-term contract for the maxim amount of time and then recruit and train a new worker to replace the old one. Especially when there are many job seekers, recruitment and training of new workers do not need to take longer than a few days. Only when the labour market is tight or the

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<sup>44</sup> For example, after a certain project for which the worker was recruited has finished.

<sup>45</sup> Article 5 of European Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP.

<sup>46</sup> CJEU 22 November 2005, C-144/04, *Mangold*, para. 64. The Court has later repeated such or similar considerations in several other rulings. E.g. CJEU 26 February 2015, C-238/14, *Commission v Luxembourg*, para. 36, 50-51.

<sup>47</sup> A.G. Veldman, ‘The Coherency of European Social Policy: The ECJ caught between Flexible Employment Policies and Upholding European Employment Rights’ in F.J.L. Pennings, Y. Konijn, & A.G. Veldman (eds.) *Social Responsibility in Labour Relations: European and Comparative Perspectives* (Kluwer Law International, 2008) 96.

<sup>48</sup> Article 7:668a Civil Code.

worker proofs to be exceptionally valuable, the employer will have an incentive to offer the worker a permanent position. Otherwise, the work is permanent, but the people have temporary positions.<sup>49</sup> Not coincidentally, these are the sectors that employ low-skilled workers, who already – as we have seen above – run the risk of receiving low pay. These are also types of work that large firms choose to outsource to other firms that are specialised in this type of work.

Many commentators have disapproved the reducing of the maximum number of successive fixed-term contracts to two years – instead of three years.<sup>50</sup> They have warned that this measure can have a counterproductive effect in the sense that it will change the position of the flexible workers for the worse: the employment contracts will last a shorter period leaving the worker without a job.<sup>51</sup> With the new measure, the worker has clarity about her prospects sooner in the process, but her prospects are not necessarily better. The new government has taken over this critique and in 2018, a proposal was introduced to extend the maximum use of successive fixed-term contracts to three years again.<sup>52</sup> However, there will still be no need to reduce flexible employment as such.

Even though there is plenty of criticism as to the effectiveness of the rules regarding the use of successive fixed-term contracts – especially regarding their ability to foster transition open-ended contracts – little attention is paid to the fact that the effectiveness is especially weak in the before mentioned low-wage sectors where workers are easily replaced. When proposing the Act on Work and Security, the Dutch government recognised that the probability that a temporary contract will be converted into an open-ended contract depends on the type of work and the type of employee who performs that work. The government acknowledges that high-skilled workers or workers in sectors where there is a great demand for labour (such as technology sectors) are likely more difficult to replace, because they are scarce and they often perform work in which they build up specific knowledge. They have better prospects on the labour market in general and they have better prospects of obtaining open-ended contracts. However, the government simply remarks that this difference in labour market prospects between low-skilled and high-skilled workers is a long-standing fact and it is in the vision of the government not dependent to the maximum number of successive fixed-term contracts.<sup>53</sup> In other words, the government may wish to reduce the number temporary workers in the Netherlands, but it has no explicit desire to reduce the difference between the low-skilled and high-skilled workers with this measure. Consequently, it takes for granted that the measure will benefit high-skilled workers more than it will low-skilled workers.

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<sup>49</sup> E.g. Gundt 2015, p. 372.

<sup>50</sup> See as one of the first commentators, F.B.J. Grapperhaus, ‘De toren van Babel en het in het Wetsvoorstel Wet Werk en Zekerheid beoogde nieuwe ontslagstelsel’, *TRA* 2014/22.

<sup>51</sup> *Kamerstukken II* 2013-2014, 33818, No. 4, p. 2; A.R. Houweling, M.J.M.T., Keulaerds, and P. Kruit (eds.), *VAAN-VvA Evaluatieonderzoek WWZ 2016*, Den Haag: Boom juridisch 2016, p. 12.

<sup>52</sup> *Kamerstukken I* 2018-2019, 35074, No. A, p. 4.

<sup>53</sup> *Kamerstukken I* 2013-2014, 33 818, No. C, p. 25.

### 3.2 Equal treatment of atypical workers

Besides treating flexible employment as stepping stones and fostering transitions into permanent contracts, prescribing equal treatment of workers with atypical contracts has been one of the main ways to improve the position of flexible workers and to prevent abuse of atypical contracts. The three main Directives on atypical work, Directive 97/81 regulating part-time work, Directive 99/70 on fixed-term work, and Directive 2008/104 on temporary agency work, all rely on equal treatment as a means to improve the quality of these forms of employment.<sup>54</sup> Any future attempts on EU-level for the improvement of working conditions of typical and atypical workers will presumably be guided by the new European Pillar of Social Rights.<sup>55</sup> The Pillar sets out a number of key principles and rights that are supposed to support ‘fair and well-functioning labour markets and welfare systems’. In addition to emphasising the importance of the principles of equal opportunities and non-discrimination, the Pillar aims to extend the guarantee of equal treatment beyond the three forms of employment relationships (part-time, fixed-term, and agency work) currently covered by the Union *acquis* and to provide for equal treatment between workers irrespective of the type of employment relationship.<sup>56</sup>

The Dutch Act on Employment and Security did not include an explicit aim to foster equal treatment of atypical workers in general. However, equal treatment was part of the reform of dismissal law. Previously, employers in the Netherlands could choose out of two procedures when dismissing permanent workers: one procedure almost guaranteed a severance payment, while the other procedure did not. The employer was completely free in choosing the procedure, which led to arbitrary outcomes. The Act on Work and Security focused on *this* inequality of outcome of the termination process and introduced a right to a standardised severance payment for every employee who has a minimum of 24 months of seniority.<sup>57</sup> Important for our purpose is that the severance payment is due also in case the employer does not continue a (series of) fixed-term contract(s). In other words, a worker with a fixed-term contract will also receive a severance payment if her contract is not prolonged, providing that she worked for the same employer for a minimum of two years.<sup>58</sup> This is a step towards more equal treatment of atypical workers since before the reform, fixed-term employees were not entitled to any severance payment. In that respect, dismissal law has become more just for employees.<sup>59</sup> However, one of the main goals of the reform of dismissal law was to reduce the costs of employment termination

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<sup>54</sup> M. Bell, ‘Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work’, *European Law Review* 2012 Vol. 37 No. 1, p. 34.

<sup>55</sup> European Commission, *Establishing a European Pillar of Social Rights*, Brussels 26 April 2017, COM(2017) 250 final. Also see the Commission Staff Working Document accompanying the Establishing a European Pillar of Social Rights, SWD(2017) 201 final.

<sup>56</sup> SWD(2017) 201 fin., p. 23.

<sup>57</sup> Article 7:673 Civil Code. This severance payment is officially labelled ‘transitory compensation’ and should, according to the legislator, be used to ease the transition from one job to another.

<sup>58</sup> The aforementioned new proposal for law reform – the Act on Labour Market in Balance – aims to introduce a right to severance payment for all employees regardless the length of their employment.

<sup>59</sup> Gundt 2015, p. 370.

in general.<sup>60</sup> Therefore, the amount of severance payments has been significantly lowered. The redistributive intent and effect of this particular reform are therefore very mixed.

The Dutch law did already provide for general rules on equal treatment of atypical workers. The Civil Code provides that employers may not discriminate between part-time and full-time employees when drafting employment contracts.<sup>61</sup> There should also be no discrimination between employees with fixed-term contracts and employees with open-ended contracts regarding the employment conditions.<sup>62</sup> In addition, the collective agreement applicable to temp agency workers now provides for same remuneration for temp agency workers as the workers directly employed by the user firm.<sup>63</sup> Arguably, the principle of equal treatment of atypical workers had already permeated Dutch labour law; there was no need to further develop this principle in the Act on Work and Security.

However, this argument fails to recognise the limitations of the (current) legal principle of non-discrimination. After analysing the three Directives on atypical work, Kountouris finds: “While the ‘equal treatment’ principle can – and ought to – play an essential role in the quest for an adequate level of protection of atypical workers, it cannot be seen as sufficient to achieve this end.”<sup>64</sup> Among other limitations and risks, he discusses the more ‘technical’ questions pertaining the identification of a ‘suitable comparator’ and the ‘single source issue’ and concludes that the idea of regulating for decent working conditions by reference to the equal treatment principle heavily relies on the assumption that the working conditions of comparable workers are indeed decent.<sup>65</sup>

Kountouris is right to question this assumption. The limitations of the reliance on the equal treatment principle become even more apparent when we consider its effectiveness in the light of economic inequality. When we concentrate on low-wage work, it is important to ask whom the atypical workers are compared to. Part-time workers and fixed-term workers are entitled to equal treatment with, respectively, full-time workers<sup>66</sup> and workers with open-ended contracts employed by the same employer. However, the wages of ‘standard’ workers have stagnated as well. Moreover, low-wage work tends to be outsourced to specialised companies. As a reaction to Piketty, David Weil specifically draws attention to the phenomenon of outsourcing.<sup>67</sup> He explains that “instead of the old model of large corporations employing workers at all levels –

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<sup>60</sup> *Kamerstukken II*, 33 818, No. 3, p. 25.

<sup>61</sup> Article 7:648 Civil Code.

<sup>62</sup> Article 7:649 Civil Code. However, both provisions state that discrimination may be justified on objective grounds.

<sup>63</sup> This collective agreement (*ABU-cao*) has been made generally binding for the whole temporary agency sector.

<sup>64</sup> N. Kountouris, ‘EU law and the regulation of ‘atypical’ work’, in A. Bogg, C. Costello, and A.C.L. Davies (eds.), *Research Handbook on EU Labour Law*, Edward Elgar publishing 2016, p. 264.

<sup>65</sup> *Idem*.

<sup>66</sup> Part-time workers should receive the same employment conditions as the full-time workers on a *pro-rata temporis* basis.

<sup>67</sup> D. Weil, ‘Income Inequality, Wage Determination and the Fissured Workplace’, in H. Boushey, J.B. DeLong and M. Steinbaum, *After Piketty. The Agenda for Economics and Inequality*, Harvard University Press 2017, p. 209-231.

skilled professionals, mid-level administrators, and manual workers, under a single roof as was the case in the past – increasingly jobs are outsourced by function, and workers who would once have been employees, and thus entitled to de jure and de facto privileges, are now forced to a race to the bottom”.<sup>68</sup> He dubbed this stratification of the labour market outside the walls of individual firms earlier as the ‘fissured workplace’.<sup>69</sup> He argues that by shifting employment to smaller organisations operating in competitive markets, a large employer creates a mechanism to pay workers ‘closer to the additional value they create’, but avoids the problem of having workers with very different wages operating under one roof.<sup>70</sup>

For the principle of equal treatment, the fissured workplace means that atypical low-wage workers are compared to standard low-wage workers. For example, observing the rule that a worker employed by a cleaning company on the basis of a fixed-term contract or zero-hours contract needs to be paid the same wage as a ‘comparable permanent worker’ will probably not have large effects in the light of income inequality. The comparison concerns other workers employed by the cleaning company and not workers employed by the actual company or organisation where the worker is performing the work. This can be a hospital, a university, a big high-tech company, etc. However, because such big organisations have outsourced work like cleaning and catering, workers in these sectors become ‘trapped’ in low-wage work and have little chances for upward mobility.

This is related to the so-called single source issue. The economic literature on inequality has shown that different firms pay observationally equivalent workers different wages.<sup>71</sup> However, the legal approach is as follows: If there are differences in pay and other working conditions between workers who perform equal work or work of equal value, then these differences need to be attributed to the same source, otherwise the working conditions of the workers involved cannot be compared on the basis of EU equality law. The CJEU has reasoned that in that case there is no body that is responsible for the inequality and that could restore equal treatment.<sup>72</sup> Due to the phenomenon such as fissured workplace, the requirement of non-discrimination can only marginally improve the position of the workers in the low wage-sectors in terms of wages.

#### 4 CONCLUSION

The Act on Work and Security was a comprehensive labour law reform. For the first time since the Second World War, considerable changes were introduced to the Dutch dismissal law. The

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<sup>68</sup> Ibid, p. 209.

<sup>69</sup> D. Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Cambridge, MA: Harvard University Press 2014.

<sup>70</sup> Weil 2017, p. 223.

<sup>71</sup> J. Lane, ‘Inequality and the Labor Market: Employers’, in B. Nolan, W. Salverda and T.M. Smeeding (eds.), *The Oxford Handbook of Economic Inequality*, Oxford University Press 2011, p. 204–205.

<sup>72</sup> CJEU 17 September 2002, C-320/00, *Lawrence*; CJEU 13 January 2004, C-256/01, *Allonby*.

discussion of the Act in this contribution did not touch upon all the matters involved in the reform. Instead, the goal was to review the Act in terms of its intended effects on economic inequality. After all, the economic literature suggests that the rise of atypical work is one of the important drivers of economic inequality today. The Netherlands has a large number of people employed in atypical contracts and with this Act, the government aimed to improve the position of flexible workers.

The conclusion must be that the legislator is still very hesitant to interfere with the possibility of employers to conclude flexible employment contracts. There is only the intent to tackle abuse of such atypical contracts. This is done by measures aimed at fostering transitions into open-ended contracts. Reforms are, therefore, mainly focused on reducing employment insecurity. The question is, however, whether such measures are effective enough. This is difficult to measure since many different factors can influence the behaviour of employers. It seems, however, that especially in low-wage sectors, there are little incentives to reduce flexible employment as such. That means that low-wage and low-skilled workers are less likely to benefit from these measures. The government explicitly acknowledges this probability, but expresses no desire to reduce the difference between the low-skilled and high-skilled workers with this measure. The measure is not intended to be redistributive.

The Netherlands already had measures in place to realize equal treatment of atypical workers. One could assume that equal treatment is the most effective norm in terms of economic inequality: flexible workers may enjoy less employment security, but at least they receive equal pay compared to standard workers. As has been argued before, however, this argument fails to recognise the many limitations of the (current) legal principle of equal treatment. Especially with disintegrated ('fissured') workplaces, the requirement of non-discrimination can only marginally improve the position of the workers in the low wage-sectors in terms of their wages.

The Act on Work and Security did introduce a change to strengthen the equal treatment norm, in the sense that it introduced a right to a severance payment for fixed-term employees when their fixed-term contracts end, provided that they have worked for the same employer for at least two years. However, the amount of severance payments, in general, has been significantly lowered with the same reform. The redistributive effect of this particular reform is therefore very mixed.

It is interesting to note that in more or less the same time period that the Act on Work and Security was adopted, the Dutch government introduced caps on top incomes in the public and semi-public sectors and caps on bonuses in the banking sector. The government did not take specific action to improve the position of workers with low-incomes, but it did try to tackle the rise of top salaries. Even though these measures were not necessarily driven by redistributive motives – they were rather reactions to the financial crisis and the public outrage about top incomes – they would certainly fit in a list of redistributive measures. When included into consideration, they show that the Netherlands have seen very mixed reactions to the financial crisis and the growing economic inequality.

The overall conclusion is that no real redistributive measures were introduced through recent labour law reforms in the Netherlands. That means that new labour laws are not likely to decrease income inequality in the near future. However, the recent economic literature offers proof that in market economies, there is no natural force that will inevitably lead to a more equitable distribution of income and wealth. In that light, it can very well be argued that labour law should strengthen its redistributive commitment, rather than turning to a market-perfecting role.